BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERRY ANN INSLEE Claimant VS. **MEDICINE LODGE MEMORIAL HOSP.** Respondent AND **KANSAS HOSPITAL ASSOC. WCF INC.** Insurance Carrier	)	Docket No. 1,001,171

ORDER

Respondent and its insurance carrier request review of the November 18, 2003 Award by Special Administrative Law Judge Jeff K. Cooper. The Board heard oral argument on May 4, 2004.

APPEARANCES

Michael J. Unrein of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that, although not listed in the Award, the evidentiary record includes the Stipulation transcript dated July 14, 2003.

ISSUES

It was undisputed claimant suffered a back injury at work for respondent on January 25, 2000, while lifting a patient. The parties disagreed regarding the nature and extent of claimant's disability caused by the accident as well as the number of weeks claimant was entitled to temporary total disability compensation.

Respondent argued that claimant was limited to her functional impairment because she had reduced the number of hours she worked even though she did not have medical restrictions prohibiting her from returning to full-time work. Claimant argued that the pain

from her work-related injury was the cause for her reduction in hours worked. Consequently, claimant argued she was entitled to a work disability because, as a result of working fewer hours, she had suffered an agreed 40 percent wage loss.

The Special Administrative Law Judge (SALJ) determined claimant's reduction in hours worked was caused by her work-related accident. Accordingly, the SALJ awarded the claimant a 41.5 percent work disability based on a 40 percent wage loss and a 43 percent task loss. The SALJ further determined claimant was entitled to 14.29 additional weeks of temporary total disability compensation.[1]

The respondent requests review of the nature and extent of disability, specifically whether claimant has met her burden of proof to establish she suffered a work disability. Respondent argues it accommodated claimant's restrictions and that claimant was not medically restricted from returning to full-time work. Respondent further argues that because claimant self-limited her hours worked, she is not entitled to a work disability and should be limited to a 7.5 to 12 percent functional impairment. If claimant is entitled to a work disability the respondent does not dispute the percentage of work disability determined by the SALJ. Lastly, respondent argues claimant has not met her burden of proof that she is entitled to temporary total disability compensation for the time periods January 25, 2000 through February 1, 2000; February 7, 2000 through February 23, 2000; and, March 26, 2002 through June 13, 2002.

Claimant argues that her modified work schedule, which respondent accommodated, is the direct result of her physical limitations caused by her work accident. Because she is incapable of working more hours due to pain claimant argues she has not refused to return to a full-time work schedule. Consequently, claimant argues she is entitled to a work disability based upon her agreed wage loss and the undisputed evidence regarding her task loss. Lastly, claimant argues that respondent was aware and did not dispute claimant was off work due to her work-related injury during the time periods respondent contests and therefore she is entitled to temporary total disability compensation for those weeks. Accordingly, claimant argues the SALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

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[1] The parties stipulated claimant had received 15 weeks of temporary total disability compensation. The disputed additional weeks of temporary total disability compensation total 15 weeks instead of the 14.29 weeks awarded by the SALJ.

Claimant, a registered nurse, was transferring a patient from a gurney to a bed on January 25, 2000, when she experienced sharp pain in her back and a sensation that her leg was paralyzed. She was unable to continue working. The next morning she had difficulty getting out of bed and called her physician who scheduled her for a CT scan.

Claimant was off work for four weeks after the accident. Respondent agreed Dr. Richard W. Meador, a doctor at respondent's hospital, was the authorized physician. She was provided physical therapy as well as a regimen of epidural steroid injections. Claimant experienced some relief but continued to have episodic back problems. Ms. Inslee was referred to Dr. John P. Estivo for additional treatment which again consisted of physical therapy and epidural steroid injections.

Dr. John P. Estivo, a board certified orthopedic surgeon, initially examined claimant on September 20, 2001. Claimant complained of lumbar spine pain which radiated into both lower extremities, left more than right. A CT scan indicated a bulging disk at L4-5 and L5-S1 toward the left. The doctor recommended an MRI of the lumbar spine. The September 24, 2001 MRI revealed degenerative disk disease at L4-5 and L5-S1 as well as a protruding disk at L4-5 on the left. The doctor additionally had claimant undergo a myelogram CT scan of the lumbar spine on November 13, 2001. That testing did not indicate any signs of nerve impingement nor herniated disks. But it did reveal bulging disks at L3-4, L4-5 and L5-S1.

Dr. Estivo concluded claimant was not a surgical candidate and diagnosed her with a lumbar spine strain. The doctor concluded claimant was at maximum medical improvement on November 29, 2001 and he rated her with a 5 percent impairment in accordance with the AMA *Guides*[2]. Dr. Estivo imposed restrictions against lifting more than 35 pounds and lifting was to be carried out occasionally. Claimant was to limit bending, twisting and stooping to no more than one-third of an eight hour day. But the doctor did not restrict the number of hours claimant could work any given day. Dr. Estivo released claimant to return to work on November 29, 2001.

Claimant noted it was difficult to perform work for eight hours and stay within Dr. Estivo's restrictions. After claimant received the restrictions she returned to working half day shifts from January to March 2002. The claimant limited the number of hours she would work in a day as well as the week. The respondent's director of nursing was aware of the reason for and approved of claimant's reduced work schedule.

When claimant returned to work she tried to see how a half day shift would work. Some days she could tolerate half days and other days she couldn't. Claimant could no longer perform the work she had done in the pharmacy because it required prolonged

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the fourth edition of the *Guides* unless otherwise noted.

standing. And claimant's restrictions prevented her from going out on emergency calls with the emergency medical teams.

At her attorney's request, the claimant was examined on March 13, 2002, by Dr. Pedro A. Murati. The doctor diagnosed claimant with lumbosacral strain with bilateral L5 radiculopathy and left SI joint dysfunction. The doctor recommended further diagnostic testing and a surgical evaluation. The doctor further opined claimant had a 10 percent whole person impairment according to the AMA *Guides*, Lumbosacral DRE category III. The doctor imposed restrictions against crawling and lifting, carrying, pushing or pulling greater than 20 pounds. The doctor noted claimant could occasionally lift, carry, push or pull 20 pounds and frequently lift, carry, push or pull 10 pounds. The doctor further restricted claimant to rarely bending, occasional climbing ladders, stairs and squatting. The doctor also noted claimant could frequently sit, stand and walk but that she should alternate such activity.

At his deposition, Dr. Murati was provided the results of the diskogram conducted after his initial examination of the claimant. After reviewing those results the doctor lowered his lifting restriction to 10 pounds and concluded claimant's permanent impairment should be increased to 20 percent based upon the AMA *Guides* Lumbosacral DRE category IV.

As claimant attempted to return to work she experienced more pain and returned to Dr. Richard W. Meador who referred her to Dr. John Gorecki. Claimant testified that she initially received permission to see Dr. Gorecki but Janeen McWilliams, vice president of claims for respondent's workers compensation third party administrator, disputed that claimant was ever told that treatment with Dr. Gorecki was authorized.

Dr. John Gorecki, a board certified neurosurgeon, examined claimant upon referral from Dr. Meador. Dr Gorecki reviewed x-rays which indicated malalignment between the fourth and fifth vertebrae and he reviewed an MRI which showed degenerative disk disease at the two lowest disk levels of the lumbar spine. The doctor ordered additional diagnostic x-rays as well as an EMG and diskography. Dr. Gorecki provided claimant an off-work slip effective March 27, 2002.

The diskography indicated radial tears in the disks at L3-4, L4-5 and L5-S1. Dr. Gorecki requested a second opinion from Dr. Stein regarding treatment and possible surgical intervention. Dr. Stein indicated that surgery would not be appropriate. Dr. Gorecki concluded claimant had mechanical low back pain. On June 11, 2002, the doctor released claimant, effective June 14, 2002, to return to work with restrictions against lifting more than ten pounds and limiting claimant to a four hour workday. Dr. Gorecki again saw claimant on March 26, 2003, and she complained of back pain. Claimant noted she could only work between 16 and 21 hours a week. And based upon claimant's request, the doctor released claimant to full-time work.

Kevin A. White, respondent's hospital administrator, testified that claimant was initially off work for approximately four weeks after her January 25, 2000 accident. Claimant's time off was approved as work-related. And Mr. White agreed that Dr. Gorecki took claimant off work from March 27, 2002 through June 13, 2002.

Kay Burns, respondent's director of nursing, noted that claimant worked full-time until her injury on January 25, 2000, but has been unable to return to full-time work since the injury. Ms. Burns noted that after the accident when claimant is working she, at times complains of back pain and on occasion Ms. Burns observes that claimant's back is bothering her. Ms. Burns noted claimant is a good employee and every effort has been made to accommodate her injury. As a result of claimant's restrictions and her complaints of pain, Ms. Burns schedules claimant to never work more than two consecutive eight hour workdays. And claimant's work schedule is restricted to no more than 20 to 24 hours a week. Ms. Burns further noted that claimant had requested Dr. Gorecki to increase her four hour restriction to a full day so that claimant could work more hours because she needed the income.

Claimant agreed that, after Dr. Gorecki removed his four hour work restriction, no physician that she had seen had restricted the number of hours that she can work. And claimant agreed respondent had full-time hours available for her to work if she was able.

If, after a work related accident, the injured employee returns to gainful employment earning less than 90 percent of the average gross weekly wage that the employee was earning at the time injury, the employee is entitled to a work disability (permanent partial general disability in excess of the percentage of functional impairment).[3]

It is undisputed by the parties that claimant has suffered a 40 percent wage loss upon her return to work for respondent. Accordingly, K.S.A. 44-510e(a) provides the method for computing work disability. But the cases interpreting K.S.A. 44-510e(a) have added the requirement that an employee must set forth a good faith effort to find or retain appropriate employment.[4] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[5]

Respondent argues that claimant has not made a good faith effort to return to appropriate employment because she has limited the hours worked even though she has not been provided medical restrictions which limit her work hours.

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[3] K.S.A. 1999 Supp. 44-510e(a).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994) *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003).

The Board finds neither the principles of *Foulk* nor the principles of *Copeland* to apply in this instance. It is acknowledged that respondent has full-time work available for claimant. However, claimant's testimony is uncontradicted that if she works more hours than her accommodated work schedule her back pain increases and it takes her longer to recover so that she can return to work. And the claimant's supervisor agreed that on occasion claimant must violate her restrictions in order to perform her nursing duties. Claimant's uncontradicted testimony is that she is physically unable to perform her nursing activities if she works more than the hours the nursing supervisor has provided as accommodation.[6]

The nursing supervisor does not dispute claimant's assertions. The supervisor agrees claimant's hours are limited because of her doctor's restrictions and her pain. Moreover, the supervisor agreed claimant limited her work simply because of her back injury. Otherwise she would be working longer hours. The nursing supervisor testified:

> Q. Do you have any reason to believe that Sherry is restricting her work for anything other than her back injury?
>
> A. Such as?
>
> Q. Well, I mean do you have any - - I'm asking you if you have any reason to believe that it would be anything other than that?
>
> A. Not to my knowledge.[7]

The Board finds claimant did not violate the principles set forth in *Foulk* when together with respondent it was agreed to alter her work schedule because of her inability to work more hours because of the back pain caused by her work-related injury. Simply stated, the respondent recognized and offered a reduction in hours worked as an accommodation for claimant's work-related injury.

Lastly, it should be noted that even though Dr. Gorecki returned claimant to an eight hour work day he did so simply because claimant wanted to attempt to work more hours for financial reasons. Such a request is indicative of a good faith effort to work as much as physically possible and is not indicative of an effort to manufacture an artificial work disability or manipulate the workers compensation system.

As previously noted, the respondent agreed at oral argument that if claimant was entitled to a work disability the percentage of such disability determined by the SALJ was appropriate. Accordingly, the Board affirms the SALJ's determination claimant is entitled

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[6] See *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

[7] Burns Depo. at 17.

to compensation for a 41.5 percent work disability based upon a 40 percent wage loss and a 43 percent task loss.

It is an axiom of workers compensation that an authorized treating physician may refer an injured worker to other medical specialists and the employer is obligated to pay for the medical services rendered as a result of such referral.[8]

Dr. Meador, a physician at respondent's hospital, was the initial authorized treating physician. After claimant was released from treatment by Dr. Estivo, she returned to four hour workdays but suffered a return of her back pain. Consequently, claimant returned to Dr. Meador who referred claimant to Dr. Gorecki. The hospital administrator was aware not only that claimant had returned to Dr. Meador but also that claimant had been referred to Dr. Gorecki who had taken claimant off work.

As long as Dr. Meador was designated the authorized treating physician then his decisions regarding claimant's ongoing medical care as well as his referrals for that care are controlling. Neither the claimant nor Dr. Meador were told that claimant could no longer seek treatment for her work-related injury. Accordingly, Dr. Meador's referral to Dr. Gorecki made that referred doctor's treatment authorized. As such, his taking claimant off work from March 27, 2002 through June 13, 2002, entitles claimant to temporary total disability compensation for that time period. Moreover, the hospital administrator was aware claimant was off work for the four week period immediately following her work-related accident. That testimony supports claimant's assertion she is entitled to temporary total disability compensation for the other disputed dates.

The Board affirms the SALJ's determination claimant was entitled to additional weeks of temporary total disability compensation. As previously noted, the SALJ determined the disputed additional weeks of temporary total disability compensation were 14. 29 weeks. However, the disputed periods add up to 15 weeks (January 25, 2000 to February 1, 2000; February 7, 2000 to February 23, 2000; and March 27, 2002 to June 13, 2002) and the award will be modified to reflect the corrected weeks of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated November 18, 2003, is modified to reflect claimant is entitled to 15 additional weeks of temporary total disability compensation and affirmed in all other respects.

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[8] *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

The claimant is entitled to 30 weeks of temporary total disability compensation at the rate of $383 per week or $11,490 followed by 166 weeks of permanent partial disability compensation at the rate of $383 per week or $63,578 for a 41.5 percent work disability, making a total award of $75,068, which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael J. Unrein, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Jeff K. Cooper, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director